No. 10890

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

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Upon Appeal from the District Court of the United States for the District of Montana.

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Appellee's brief herein contains a number of statements and conclusions which require brief comment. We shall discuss same in the order of appearance in that brief.

1. Alleged Ommissions in Appellants' Statement of the Case.

On the first page of brief the appellee states that

appellant omitted reference to the fact that Witness Stephenson testified "that in making his investigation he observed no other cattle bearing a different brand than Mr. Connolly's (R. 140) and didn't recall noticing any other brands other than Mr. Connolly's" (R. 141). It is true Witness Stephenson did make such statements substantially in certain answers, but by such answers the witness did not intend to convey the impression that he did not see other cattle than Mr. Connolly's grazing on the land, as it clearly appears there were other cattle bearing other brands on the land at the time. The following questions and answers of the Witness Stephenson appearing on pages 140 and 141 of the record, referred to by appellee, show he saw other cattle at the time:

"Q. And so that I may understand you, and be correctly advised, then at no time when you went out and observed Mr. Connolly's cattle grazing on any of the land described by you in your testimony, did you see any cattle or horses or sheep grazing that same area?

A. If you put it that way, yes.

Q. So, how many cattle did you see grazing in that area at that time, other than Mr. Connolly's?

The Court: "That area." You must be fair with the witness. That might not be a very comprehensive question to the witness. Describe it more definitely.

Mr. McCabe: I will.

Q. On the allotments that you examined at that time, how many other cattle did you see grazing on those allotments?

A. Do you refer to the groups of cattle that we counted in trespass, I don't recall noticing any other brands other than Mr. Connolly's in the bunch. However, there were some that we omitted because we could not definitely identify the brand on them.

Q. So that there were other cattle. How many head then would you say were grazing up on that particular allotment?

A. I couldn't say. It all depends on the particular bunch of cattle.

Q. You made no count of these particular cattle grazing at that time?

A. We presumed that they were——

Q. Just answer my question. You made no count?

A. No, we just skipped those cattle there, we could not identify the brand.

Q. Did you count any other cattle than Mr. Connolly's cattle on those occasions?

A. Not at that time, no."

On page 2 of appellee's brief, and as included in alleged omissions of evidence by appellant appearing at pages 146 and 147 of the record, reference is made to a conversation between Witness Stephenson and Brian Connolly at the time of their first meeting. The very evidence claimed to be omitted is expressly referred to and in part quoted between the tenth and twentieth lines on page 32 of appellants' brief.

In paragraph 3 on page 3 of appellee's brief it is stated that Witness Barrett testified that "every day he passed through that area he saw horses and cattle. The horses bore the Connolly brand." Immediately following the foregoing appears the statement: "These cattle belong to both appellants (R. 161)." Referring to the record where Witness Barrett mentioned seeing cattle and horses every day on the Blood allotment, we find that the above statement is not the testimony of the witness (R. 159-161). The witness testified he saw horses and cattle every day for two weeks when he passed through the Blood allotment (R. 159). Asked if he identified any of the

horses the witness said: "On one or two occasions, yes" (R. 160). He then testified that August 13, 1941, was the date he identified 32 head of the horses as bearing the brand PY (Brian Connolly's brand) on the left jaw. On August 8, 1941, (R. p. 158) this witness had seen 25 head of horses on "section eleven, thirty-five, nine" (Blood allotment) but he did not identify same as belonging to anyone (R. 158). Consequently, the appellee's statement that the witness saw horses on the Blood allotmnt bearing the Connolly brand every day he passed through same is not supported by the record. Neither does the record bear out the statement that these cattle belong to both the Connollys, since the witness identified horses bearing Brian Connolly's brand only. Page 161 of the record refers to a date of October 24th and the 36 head of cattle mentioned were not owned jointly by the Connollys but part only (number not stated) bore Brian Connolly's brand and part only (number not stated) bore Daniel Connolly's brand.

At bottom of page 2 of brief appellee refers to evidence as being omitted by appellant with reference to Connolly cattle, cattle with Dan Connolly brand, and a reference to Sinclair, Ryan and Payne cattle (R. 149-150). Reference to all this evidence is made in appellants' brief. On pages 20 and 21 of appellants' brief the 48 head of horses, made up of one bunch of 20 head and one bunch of 28 head, is discussed. At page 28 of appellants' brief the cattle of others run by Connolly is discussed. The designation of "Ryan cattle" was admitted by the witness

to be a misnomer, that the man's name was "Payne," not "Ryan" (R. 152). However, as to the Sinclair cattle and Payne cattle, they are not involved as they did not run with Connolly cattle until 1942, and none of these cattle is claimed to have been in trespass at any time.

The other alleged omissions are likewise wholly immaterial to a determination of the questions before the court. It clearly appears that no material evidence was omitted from appellants' brief.

2. Argument of Appellee.

On page 6 of appellee's brief a part of the decision of the trial court is quoted apparently with a view to call the attention of the court to the alleged violation of the temporary injunction by Brian Connolly. The evidence upon which the violation of the temporary injunction was based related to the same circumstances stated by Witness Stephenson as to his having on January 16th, 27th and 28th, 1942, seen certain horses and cattle in the area adjoining the land (R. 123, 124). The learned trial judge apparently was of the same opinion at the time of the finding of the violation of the temporary injunction as he held at the time of the trial on the merits that the mere fact that Connolly cattle and horses were seen on other land was sufficient to establish a willful trespass. That very question is now squarely presented to this Court for determination, on the merits of the action. If the decision of the lower court in this cause on the merits is erroneous then the trial court was in error in finding that Brian Connolly violated the temporary injunction.

On page 7 of appellee's brief objection is made that appellants' statement that the cattle were grazing on unfenced land is contrary to the evidence of the witnesses for the government. Government Witness Stephenson testified that his testimony as to various units having fences relates to a time after the commencement of this action and the happening of the alleged trespasses (R. 137 ll. 18-20, R. 138 ll. 7, 8). Government Witness Girard testified that out of all the 320 or 325 units (R. 359) ten only he recalls as being fenced (R. 358, 359). On cross examination he, in effect, admitted that the area on which the cattle of Connolly were seen was not surrounded by fences (R. 361) and that some of the fenced units were fenced only on one side or three sides, and that in 1941 some of this fencing was bound to be down (R. 359-363).

Obviously, land on which the fence is down, or land fenced on one, or two, or three sides only is not enclosed by a fence, and hence we reiterate, upon the testimony of the Government's two witnesses, the cattle of Connolly's were on open unfenced land.

At page 8 of appellee's brief various purported trespasses and dates are enumerated and the numbers of livestock added to make 258 head. Included in this count are 25 horses July 5, 1941, which date should be July 24, 1941, (R. 150 ll. 21-29, R. 162 ll. 8-15). Also included are 25 head horses and 45 cattle, testified to by Barrett, but not identified as either of the Connolly's horses on August 8, 1941, (R. 157 & 158). In this count are included 36 head of cattle, part bearing Brian Connolly brand and part Dan Connolly

brand, but numbers of each not segregated (R. 161).

In appellee's brief, pages 9 and 10, appellants are charged with misquoting Section 179, Title 25 U. S. C., because at the bottom of page 29 of appellants' brief the word "forfeit" is used. By referring to page 29 of our brief it clearly appears the appellants do not purport to quote the statute verbatim. It says the statute "provides substantially" that a person shall forfeit the sum of One Dollar for each animal. Webster's Twentieth Century Dictionary gives the word "forfeit" as a synonym for the word "Penalty," and the definition of the word "forfeit" in the dictionary applies equally to the loss of the One Dollar a head as a penalty under the statute. The objection is one of words and not of substance.

It is evident from pages 10 to 13 of appellee's brief that appellee misconceives the purport of appellants' contention (Appellants' brief pp. 30-32) as to a court of equity refusing to enforce a penalty by way of punishment. Appellee's argument is to the effect that appellants contend damages may not be awarded in an equity action. Such is not our contention. We admit a court of equity may allow damages by way of compensation for an injury, but we say this Court has adopted the rule that equity will not in granting relief enforce a penalty by way of punishment.

On page 11 of appellee's brief it is stated that at the opening of the trial counsel for the Government referred to the penalty statute "without any response of appellants or their counsel." Reluctantly we must say this statement is incorrect. Reference to pages

86 and 87 of the record discloses, immediately following the opening statement, counsel for appellants (R. p. 87) expressly stated he disagreed with the statement made by counsel for the Government.

It is urged by appellee (brief pp. 15-17) that Congress may abrogate a treaty and by the provision quoted from the Wheeler-Howard Act the Treaty of Laramie was abrogated. A reading of the quoted provisions of the Wheeler-Howard Act will not support the contention. It is a familiar and well established rule that before a treaty right will be deemed abrogated it must clearly appear such was the intent of Congress (Osage Tribe v. U. S., 66 Ct. Claims 64, 279 U. S. 811, 73 L. ed. 9).

The act does not take away the right of Indians to graze the reservation lands. It gives authority to the Secretary to make reasonable rules and regulations to restrict their grazing of livestock to the estimated carrying capacity of Indian range units and to promulgate rules and regulations to protect the range from deterioration, and to assure full utilization of the range. The right to make rules concerning an act admits the existence of the right to do the act. Reference to rules, Title 25, Code Federal Regulations, will be later made in discussing that part of appellee's brief devoted to a consideration of such rules.

It is also a well established rule that vested rights acquired under an Indian Treaty or act of Congress may not be destroyed.

Tulee v. Washington,
315 U. S. 681, 86L. ed. 1115,
Shoshone Tribe v. United States,
304 U. S. III, 82 L. ed. 1213, at 1217-1219,
Choate v. Trapp.
224 U. S. 665, 56 L. ed. 941, at 945-947.

As to ratification of the tribe of the provisions of the Wheeler-Howard Act (Appellee's brief 16, 17), since the act itself does not destroy the grazing rights a ratification of the act by the tribe does not do so.

Furthermore, the Wheeler-Howard Act does not destroy the tribal custom.

Pages 20-23 of appellee's brief discusses the distinction between Indian Lands and public domain and cites the Taylor Grazing Act (page 21 of brief) as definitely destroying the "open range." This does not aid appellee. The provisions of the Taylor Grazing Act expressly exclude from its operation and effect lands in "Indian reservations," national parks and monuments, Alaska and certain other specified lands (48 Stat. 1269, 315-315 m, Title 43 U. S. C.), hence it did not affect grazing rights on the Blackfeet Indian Reservation.

Indian forestry units are not involved in this case.

In attempting to sustain the judgment for the penalty appellee resorts to Sec. 71.21 of Title 25 of Code of Federal Regulations, which provides a penalty of $1.00 a head for trespassing cattle. The provision for a money penalty was not incorporated in said section as an amendment until March 24, 1942, long after the complaint in the above action was filed and consequently, cannot be applied to the trespasses

complained of in the complaint. The regulation subd. (b) expressly excepts from its operation livestock "exempt from permit." Thus, under the regulation and under the department's interpretation of the section as testified to by Witness Stephenson, the appellants were not trespassers (R. 139, ll 4-23).

The provision from the corporate charter quoted at the bottom of page 25 of appellee's brief merely conforms to the provisions of the Wheeler-Howard Act which does not destroy grazing rights of Indians, but provides for the regulation of the right.

The rules promulgated by the Secretary of the Interior at the time of the alleged trespasses not being applicable to the stray stock of the Connollys will not sustain the judgment for the penalty.

We respectfully submit the trial court's judgment should be set aside.

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